REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 248 of 2008

HAMADI MASUDI MTAWA..…….....…….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT

The appellant, Hamadi Masudi Mtawa, was tried and convicted by D. O. Ogembo, then a Senior Resident Magistrate at Kwale on a charge of defilement of a girl under the age of 16 years contrary to section 145 (1) of the Penal Code. The particulars contained in the charge were that on the 29th day of March 2004, at about 7.00 p.m. in Kwale District within Coast Province, the appellant had carnal knowledge of M.M.S (hereinafter "*the complainant"*) a girl under the age of 16 years. The appellant faced an alternative charge of indecent assault on a female contrary to section 144 (1) of the Penal Code. Upon his conviction on the main charge, the appellant was sentenced to fifteen (15) years imprisonment.

Being dissatisfied with his conviction and sentence, the appellant has appealed to this court on various grounds which, in the main, allege breach of his fundamental rights under the constitution, conviction on uncorroborated, inconsistent hearsay and contradictory evidence.

When the appeal came up before me for hearing on 20th July 2009, Mr. Onserio, Learned State Counsel, did not oppose the appeal on the main ground that the complainant did not fully testify before the Lower Court and that there was no eye witness to the defilement. Mr. Nyamboye, Learned Counsel for the appellant, concurred with the position taken by the Learned State Counsel and emphasized that there was no evidence to connect the appellant to the offence.

I have considered the evidence which was adduced before the Learned trial Magistrate. The Learned trial Magistrate convicted the appellant on the testimony of the complainant's mother, M.B, who testified as PW 1 and that of Chrispin Mnyapara, PW 5, who produced the P3 form. The complainant's mother was not an eye witness to the offence. She connected the appellant to the offence from the description given by the complainant. In her own words:-

"I started asking her what happened. She told me she was playing and another man came who buys oranges and he called me and told her to go to the camp where she was defiled under the trees……"

When the complainant was called, she did not testify that the appellant defiled her. It would appear from the record that the complainant was stood down as a witness on the prosecutor's application. The appellant was therefore not positively identified. The medical evidence was given by Chrispin Mnyapara,

PW 5, aforesaid. The record does not show the basis upon which he produced the P3 form on the complainant. His qualifications were not disclosed. So even if the appellant had been positively identified there would still be no satisfactory medical evidence to support the charge.

Before concluding this matter, I have noted one point which was not addressed by either the appellant or the Learned State Counsel. It relates to the charge. A plain reading of the same shows that the charge is defective. Section 145 (1) of the Penal Code (now repealed) was in the following terms:-

"145 (1) Any person who unlawfully and carnally knows any girl under the age of fourteen years is guilty of a felony and is liable to imprisonment with hard labour for fourteen (14) years together with corporal punishment."

A subsequent amendment raised the age to 16 and removed the corporal punishment. As can be seen, for a person to be liable under the section, he must have had, not just carnal knowledge, but that the carnal knowledge must have been unlawful. So the "*unlawful carnal knowledge"* is a fundamental ingredient of the offence of defilement under the section. The failure to state in the particulars that the carnal knowledge was unlawful rendered the charge fatally defective. The charge as laid did not therefore disclose an offence known to Law. I need not consider the rest of the grounds of appeal raised by the appellant. I allow this appeal, quash the conviction and set aside the sentence imposed upon the appellant. The appellant should be set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

13TH OCTOBER 2009